BOTO MUDIM

v.

ASSISTANT COLLECTOR OF LAND REVENUE, PAPAR

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[ORIGINATING MOTION NO. 12 OF 1988]
27 SEPTEMBER 1991

ADMINISTRATIVE LAW: *Appellant granted temporary occupation licence - Subsequent cancellation - Application for order of certiorari to quash the order - Natural justice.*

CIVIL PROCEDURE: *Application to reinstate hearing which was struck off - Whether there was compliance with Rules of the High Court - Delay of more than 6 weeks to make application - Rules of the High Court 1980, O. 53 r. 1A, r. 1(2), (3), 5(1), O. 92 r. 4.*

On 16 August 1988, the respondent (Assistant Collector of Land Revenue) cancelled the temporary occupation license (TOL) which had been granted to the applicant on 12 May 1988.

The applicant filed an *ex parte* notice of motion under O. 53 r. 1(2) of the Rules of the High Court 1980 (RHC) on 13 January 1989 for leave to be granted to her to apply for an order of *certiorari* to quash the said order.

On the day the application was to be heard, the applicant's Counsel was absent, as a result of which the motion was struck out. The applicant then applied to reinstate the hearing under O. 92 r. 4.

It was averred by the applicant's Counsel that his absence was due to an inadvertence in noting the date of the hearing of the application.

Held:

[1] There was nothing illegal or irrational about the letters informing the applicant of the cancellation of the TOL - the letter dated 14 July 1988 explained to the applicant about the complaints from the residents, which gave the applicant an opportunity to explain the matter. The letter dated 16 August 1988 stated the reason for the cancellation and that the respondent was acting on a condition of the licence which indicated that the TOL could be rescinded or cancelled at any time without notice. The applicant had accepted the conditions as contained in the licence.

[2] The application for leave to apply for an order of *certiorari* was not made within the 6 weeks period as required by O. 53 r. 1A of the RHC. Neither was there evidence that the applicant had complied with O. 53 r. 1(3).

[Summons-in-Chambers dismissed.]

Cases referred to:

Buga Singh v. Koh Bon Keo [1967] 1 MLJ 16 ***(foll)***
Chai Huat Seng v. Hochtief - Holzmann [1969] 2 MLJ 192 ***(cit)***
Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152 ***(foll)***
R. v. Gaming Board for Great Britain ex-parte Benaim & Khaida [1970] 2 QB 417 ***(foll)***
Schmidt v. Secretary of State [1969] 1 All ER 904 ***(foll)***
Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1984] 3 All ER 935 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 53 rr. (1A), 1(2), 1(3), 5(1), O. 92 r. 4

For the Applicant - Sugumar Balakrishnan; M/s. Sugumar & Co, Kota Kinabaalu

JUDGMENT

Syed Ahmad Idid JC:

The applicant filed an *ex parte* notice of motion under O. 53 r. 1(2) for an order-in-terms of the originating motion dated 13 January 1989. Among the orders asked for was for leave to be granted to her to apply for an order of *certiorari* to quash an order made by the respondent on 16 August 1988 cancelling the temporary occupation licence granted to the applicant on 12 May 1988 *vide* Ref: No. LS223.1.3/9 LTS/us.

This matter has come to Court on five occasions. It was on 26 January 1989 that the Judge adjourned the matter to 9 February 1989 for hearing but on that day the applicant's Counsel was absent. The Judge then ordered that the motion be struck out and this was accordingly done. Mr. Sugumar Balakrishnan, in his affidavit affirmed on 14 February 1989, stated that he was representing a Captain at a trial at the Lok Kawi Camp on 9 February 1989 and that he had noted the date of hearing as 29 and **not** 9 February 1989.

The applicant then filed an *ex parte* summons-in-chambers under O. 92 r. 4 asking for an order that the applicant's *ex parte* notice of motion dated 13 January 1989 which was struck out on 9 February 1989 be reinstated for hearing.

In *Buga Singh v. Koh Bon Keo* [1967] 1 MLJ 16, Raja Azlan Shah J (as His Majesty then was) went into the case in some detail and then decided that '... so long as the claim shows some merits ... a new trial ought to be ordered.' *Chai Huat Seng v. Hochtief-Holzmann* [1969] 2 MLJ 192 has its peculiarities in that the defendant went about the Court and used a procedure which, as Chang Min Tat J observed, "was clearly wrong" and the defendant obtained a dismissal of the action.

(a) I am aware of the several cases which support "natural justice." In *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 152 it was held, allowing the appeal:

> ... the rule of natural justice that no man may be condemned unheard applies to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing.

(b) For such matters, we must quote Lord Denning and one such passage appears in *R. v. Gaming Board for Great Britain ex parte Benaim & Khaida* [1970] 2 QB 417 where His Lordship said:

> It follows, I think, that the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them of the matters specified in the subsection. They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office, as in *Ridge v. Baldwin* [1964] AC 40: or depriving him of his property, as in *Cooper v. Wandsworth Board of Works* [1863] 14 CBNS 180.

(c) I very much like the passage in *Schmidt v. Secretary of State* [1969] 1 All ER 904 at p. 907 where Lord Denning MR said:

The first point is whether there is any case for saying that the Home Secretary acted unlawfully in refusing an extension. Both sides accepted as correct the statement in *R. v. Brixton Prison (Governor), ex parte Soblen* [1962] 3 All ER 641 at p. 661; [1963] 2 QB 243 at p. 302 where I said that the validity of the Ministers act:

> ... depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.

(d) The case of *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1984] 3 All ER 935 at p. 937 states that:

> Administrative action is subject to control by judicial review under three heads: (1) illegality, where the decision-making authority has been guilty of an error of law, e.g., by purporting to exercise a power it does not possess; (2) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision; (3) procedural impropriety, where the decision-making authority has failed in its duty to act fairly.

Tested by these rules and the judgments which I have just referred to, and applying them to this case, it would appear that the letters dated 14 July and 16 August 1988 from the Penolong Pemungut Hasil Tanah, Papar to the applicant, were rather unilateral. But the letter dated 14 July explained to applicant the occurrence and informed her of the complaints from the residents. This was akin to giving the applicant an opportunity to disabuse the writer. She should have replied to that letter or taken up the cudgel for herself. The applicant and her husband met the writer of the two letters (para. 13 of her affidavit dated 26 September 1988). That was another avenue for her to have raised her views or to have "defended" her licence. The validity period of the licence was from 1 January 1988 to 31 December 1988 (one year only) but the licence was issued mid-year on 15 June 1988. The applicant had accepted the conditions on the licence, one of which was:

> Lesen ini boleh ditarik balik atau dibatal pada sebarang masa dengan tidak perlu diberi notis... (this licence can be rescinded or cancelled at any time without notice).

The instant application was made under O. 92 r. 4, that is the Court may make an order "as may be necessary to prevent injustice or to prevent an abuse of the process of the Court" (the inherent powers of the Court). This brings me back to the earlier originating motion dated 13 January 1989. The second letter dated 16 August 1988 cancelled the licence when the Penolong Pemungut Hasil Tanah wrote to the applicant:

> Dengan ini maka lesen puan tersebut diatas (Pengambilan Pasir Sungai Simpang Kanan Papar TOL 02900117) adalah dibatalkan.

Was this letter written unlawfully? Its validity was on its purpose which was a follow up of the July 14 letter. I cannot see it as illegal or irrational.

So when the *ex parte* notice of motion was dated 13 January 1989, it was a long way after the cancellation. Order 53(1A) Rules of High Court 1980, states that "leave shall not be granted ... unless the application is made **within** 6 weeks ..." Even if I treat the date on the statement which Counsel had submitted pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980 (26 September 1988) as the date the notice was filed in, or as the "date of proceeding", it was still clear the application was not made **within** six weeks. Additionally there was/is no evidence that the applicant had complied with O. 53 r. 1(3). This has relevance to the evidence to be brought into Court pursuant to O. 53 r. 5(1) in case leave is granted to her.

Following *Buga Singh v. Koh Bon Keo* (*supra*), one could see that there were various deficiencies in the merits of the applicants contention:

(i) the licence itself was a once-off matter;

(ii) the applicant had accepted its unilateral nature;

(iii) the lapse of time from 1988 to the hearing of this application in 1991 will impede justice; and

(iv) applicant's non-compliance with O. 53 r. 1(3) disentitles her from questioning the validity of the order made by the respondent. See O. 53 r. 5(1);

(v) the applicant's expenditure (yet to be proved) was her own choice and so should not in any way determine the outcome of this application.

The rules of natural justice may appear to favour and smile on the applicant. But she has not complied with the Rules of the High Court in her application. For these reasons and the principles I have aired above, the summons-in-chambers dated 15 February 1989 is dismissed. I shall make no order as to costs as I accept Counsel's "honest and genuine mistake" regarding the mix-up in the date of the adjourned hearing.

Also found at [1991] 3 CLJ 2852